IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 68

DELVAILLE H. THEARD,

Petitioner,

versus

UNITED STATES OF AMERICA

On Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF ON BEHALF OF DELVAILLE H. THEARD, PETITIONER.

DELVAILLE H. THEARD,
Pro Se.

SUBJECT INDEX
AND
ANALYSIS OF PETITIONER'S ARGUMENT.

(8)

It is universally conceded that disbarment is not by way of punishment but is motivated for the public good. Since it is believed that our opponents will not deny that petitioner has, for at least ten years, happily regained his health, physical and mental, it can not now be claimed seriously or in good faith that, for the purpose of protecting the public, petitioner, who is now in every way competent and responsible, should at the present time be deprived of the right to practice his profession in the Courts of the United States 30

(9)

The inexcusably long delay in filing, on June 16, 1952, the suit for disbarment in the State Court, on account of an act allegedly committed on January 2, 1935; the fact that the action, when finally instituted, was barred by limitation under the Louisiana statute; the failure of the State Court to decide this all-important issue, despite petitioner's appropriate plea, the petitioner thus being deprived of due process under the law of the State. Louisiana Revised Civil Code. Articles 3544, 3459, 3528 and 3530. Louisiana Code of Practice, Articles 115 and 964 (Act 308 of 1910). In re Kenner, 178 La. 774, 152 So. 580. 31

(10)

Decisions from other States hold, without any exception, that we have been able to find, that it has always been the policy of the Courts to discourage and refuse to consider stale and prescribed claims for disbarment. 35

(11)

The fact that an application for certiorari to the Louisiana Supreme Court in reference to the disbarment of petitioner was denied without comment in this Court, Theard v. Louisiana

State Bar Association, 348 U. S. 832, 99 L. Ed. . . . , 75 S. Crt. 54, does not, under the established jurisprudence on this subject, constitute a precedent on any issue raised in the present petition and Brief. Robertson & Kirkham, "Jurisdiction of the Supreme Court of the United States" (1951), pages 603, 604, 605 and 610. 40

AUTHORITIES CITED.

AUTHORITIES CITED—(Continued).

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REPORT OF DECISION BELOW.

Delvaille H. Theard v. United States of America, decided January 6, 1956, reported in 228 Fed. (2d) 617 (Tr. p. 24). Rehearing denied (without opinion), January 31, 1956 (Tr. p. 26).

GROUNDS OF JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1), and Section 1 of the Fourteenth Amendment to the Constitution of the United States of America.

STATUTES INVOLVED.

Title 28, Section 1254 (1), United States Code (see Appendix, page 43). Section 1 of the Fourteenth Amendment to the Constitution of the United States of America. (See Appendix, page 43).

Constitution of Louisiana (1921), Article VII, Section 10. (See Appendix, page 43).

Rules of the Louisiana Supreme Court (Charter of Louisiana State Bar Association, Article 13, Section 4). (See Appendix, page 44).

Revised Civil Code of Louisiana, Articles 3544, 3459, 3528 and 3530. (See Appendix, page 45).

Louisiana Code of Practice, Articles 115 and 964. (See Appendix, page 46).

QUESTIONS PRESENTED FOR REVIEW.

1.

Is it proper and legal that a Federal Court, on consideration of a motion for the disbarment of a member of its bar, should use, as the only cause of action, a State Court disbarment decree, when 1) said State Court decree was rendered in direct disregard of the Constitution of the State; and 2) the alleged reason for disbarment being unsound and capricious, the said State Court decree, and consequently the decree of the Federal Court which wholly follows and depends upon it, deprive the lawyer of his property right to practice his profession, without due process of law?

2.

When a State Supreme Court has handed down a decision [1] decreeing that a lawyer was suffering from a mental condition and impairment on account of which he was irresponsible and should be treated and considered accordingly, is it proper, legal and just that the same State Supreme Court should decide, some years later,[2] when the lawyer has recovered from his mental affliction and resumed professional practice, that he should be disbarred and deprived of his property right to practice his profession, on account of the very acts as to which the State Court previously had solemnly declared.[3] that the lawyer, because of his mental condition, was not responsible or accountable?

3.

Does a disbarment decree satisfy the requirements of due process of law under the Fourteenth Amendment, when it deprives a lawyer of his property right to practice his profession and earn his living, for the sole and exclusive reason that, eighteen years previous, he committed acts for which the Court at that time decreed that he should not, because of his then mental condition, be held responsible; when, at the time of the bringing of said disbarment suit eighteen years later, the lawyer had unques-

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[1] State v. Theard, 212 La. 1022, 34 So. (2d) 248.

[2] Louisiana State Bar Association v. Theard, 225 La. 98, 72 So. (2d) 310.

[3] See Note 1, supra.

tionably recovered his physical and mental health fully, had already resumed a very active law practice, and during the six years immediately preceding the disbarment, had briefed, tried and argued thirty-seven cases, without one word of criticism or reprobation in the appellate courts of the State? (Tr. p. 19).

4.

Can a State Supreme Court, after putting aside all other considerations and specifically refusing to consider any charges of willful misconduct as strenuously urged by the prosecuting Bar Association Grievance Committee, enter a valid decree of disbarment based entirely on mental illness and irresponsible acts, as conceded by the Court itself; when the entire question of disbarment and the power and jurisdiction of the said Supreme Court to act in disbarment matters depend exclusively on the State Constitution, which specifically provides that the only cause for disbarment in the State is willful misconduct? [4]

5.

And can a Federal Court with propriety adopt such a decree as the sole cause of disbarment in a case in its jurisdiction, when it is patent that illness is not misconduct, and the lawyer, many years later and having fully recovered from his illness, is thus deprived of his property right to practice his profession, without due process of law?

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[4] La. Constitution (1921), Article 7, Section 10. Appendix to this Brief, page

Is it proper to entertain a claim for disbarment when the alleged cause of action, although fully publicized and widely known at the time, has been allowed to remain dormant for nearly twenty years, during which interval the lawyer had completely recovered from his illness and, for at least six years immediately preceding the disbarment decree, has resumed active practice, and without the slightest criticism or question, has argued numerous cases in the appellate courts of the State?

STATEMENT OF THE CASE.

Theard, the petitioner, was born in New Orleans on July 17, 1888. He was graduated from the Tulane Law School in 1910 and was admitted to the bar that year. For a few years he was associated with his uncle, the late Charles J. Theard, but on the whole has always practiced law alone.

In 1916, he became the Editor in Chief of the (Tulane) Southern Law Quarterly (Volumes 1; 2 and 3), which Law Review was stopped by the first world war. When said Journal was resumed as Volume 4 of the Tulane Law Review, petitioner was a member of its Editorial Board, a position which he held until his illness in 1935.

He became an expert in probate law and practice, and from 1919 to 1935—sixteen years,—taught practice, wills and administration, part time, in the Tulane Law School. However, his nervous condition had become so

acute that he was compelled to give up his teaching at the beginning of the 1935 law school term.[5]

He was also proficient in land law and Louisiana titles; was the attorney for more than twenty years of a large New Orleans building and loan association; was Chairman of the Legislative Committee and general counsel of the Louisiana Homestead League; and was at one time Chairman of the Legislative Committee of the United States League of Building and Loan Associations.

His affairs became seriously involved, and on August 4, 1936, he was charged with embezzlement by one Georgine Denis Merrill.

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[5] The work of petitioner as a part-time professor of civil law (descent and distribution, wills, administration) in the Tulane Law School for sixteen years (from 1919 to 1935) was a valuable contribution rendered by him to his chosen profession, without one cent of pecuniary return. When petitioner's increasingly nervous condition necessitated his resignation in 1935, the measure of his contribution to Tulane and legal education was expressed in a Resolution of the Law Faculty signed by Hon. Rufus Carrollton Harris, then Dean of the Tulane College of Law and since 1937 President of Tulane, in part as follows: "It is with sincere regret . . . that the Faculty tenders this expression of its acknowledgment and deep appreciation of the high quality of the service rendered by Mr. Theard to the institution during the many years of his close connection with it and its affairs, a service characterized at all times by technical and class-room ability of a high order, by a spirit of intense loyalty to the School, and by a disposition which endeared him to students and colleagues alike . . ." And Hon. Paul Brosman, then Assistant Dean of the College of Law (subsequently and until his recent death a Judge of the Military Court of the United States) wrote the petitioner at the time of his resignation: "Never have I known a more loyal and able body of part-time teachers than is found in our practitioner colleagues at Tulane, and among them no one has evidenced more interest in, and devotion to, the School and the cause of modern legal education than yourself . . ."

In the Merrill case, Theard plead insanity. He was moved to DePaul Sanitarium, New Orleans, as a patient on September 2, 1936, where he was confined until July 27, 1943, on which day he was moved on Court order to East Louisiana State Hospital for the Insane at Jackson, Louisiana. He remained at Jackson until February 17, 1944, and was returned to New Orleans and held in the Parish Infirmary at New Orleans until February 25, 1947, when, **having been tried by a jury on the charge of Mrs. Merrill, he was ACQUITTED.**

He was thus hospitalized as an insane person, in private and State institutions continuously from September 2, 1936, until February 25, 1947,—TEN YEARS, FOUR MONTHS AND TWENTY-THREE DAYS.

Theard's civil interdiction, which had been initiated in August 1936, was lifted by a decree of the Civil District Court (probate) in May, 1948; and **Theard, having fully recovered from his illness, thereupon resumed the practice of law, which he pursued industriously and constantly until April 26, 1954,** (See list of cases argued by him, Tr. p. 19), **when the decree in the State disbarment suit against him became final.** Louisiana State Bar Association v. Theard, 225 La. 98, 72 So. (2d) 310.

On June 16, 1952, the State Bar Association, through its Committee on Grievances and Ethics, sued Theard for disbarment.

The alleged offense was said to have been committed on January 2, 1935,—seventeen years previously.

The respondent (now petitioner) filed several exceptions: Prescription, laches and delay; estoppel; the

illness—insanity—as will be fully shown in the present Brief, p. 13, judicially found and acted on in Theard's favor by the Louisiana Supreme Court in the case, State v. Theard, 212 La. 1022, 34 So. (2d) 248.

These several defenses, all of them (we say with respect) well founded and which should have been maintained, were overruled and adversely disposed of by the Louisiana Supreme Court in its two opinions in the disbarment case: the opinion on the exceptions, 222 La. 328, 62 So. (2d) 501; the opinion on the merits, 225 La. 98, 72 So. (2d) 310.

The Federal Court, we submit, erroneously followed the State ruling. The Circuit Court of Appeals did not discuss petitioner's defense and argument, merely stating in its memorandum opinion (Tr. p. 25) that his contentions were not persuasive. (Tr. p. 24). Petitioner's application for certiorari was granted by this Court.

Summary of Argument.

(Please refer to Subject—Index for Analysis and Summary of Petitioner's Argument.)

(1)

Under the Louisiana Constitution, willful misconduct is the only ground which furnishes a basis for disbarment. When the Louisiana Supreme Court renders a decree of disbarment for a cause other than misconduct, the decree is void for lack of jurisdiction *ratione materiae*.

The period of more than ten years during which Theard was continuously confined in mental hospitals and

treated for his infirmity until his complete recovery and restoration to mental health, has already been detailed. (See details of petitioner's treatment and confinement in mental institution, this brief, p. 7). Suit for his civil interdiction had been instituted in August 1936; judgment duly rendered.

It has always been fundamental in Louisiana that the right to disbar is strictly statutory, and for the last sixty years (See the State Constitution of 1898) disbarment has always depended on, and been limited by the State Constitution. *Louisiana State Bar Association v. Connolly*, 201 La. 342, 9 So. (2d) 582; *Louisiana State Bar Association v. Leche*, 201 La. 293, 9 So. (2d) 566.

Misconduct is the only ground.

The Supreme Court lacks jurisdiction in any attempted disbarment on the ground of insanity, for insanity is not misconduct.

Supreme Court Jurisdiction, Louisiana Constitution, Article VII, Section 10:

> ". . . It (the Supreme Court) shall have exclusive original jurisdiction **in all disbarment cases involving misconduct of members of the bar,** with the power to suspend or disbar under such rules as may be adopted by the court. . . ."

And the Rule which the Louisiana Supreme Court made on this subject, conforms strictly to the Constitutional limitation on disbarment, and specially provides that the misconduct of a lawyer to justify disbarment must be "Willful" misconduct.

(This Rule made by the Supreme Court was placed by the Court for convenience of reference in the Charter of the Louisiana State Bar Association, and is reproduced as Section 4 of Article 13, of said Charter, in West LSA Revised Statutes of Louisiana, Vol. 21, page 380. See Appendix to the present Brief, page 44).

Louisiana State Bar Association v. Connolly, 201 La. 342, at page 353, 9 So. (2d) 582, at page 585:

> "A consideration of the lucid language used in the Constitution makes it apparent that, while this Court has been vested with exclusive original jurisdiction in all disbarment cases, **the jurisdiction is expressly limited to cases involving misconduct of the members of the bar. . . .**"

At page 354, 201 La., and page 586, So. (2d):

> ". . . the language used in Section 10 of Article VII is too clear and direct in its meaning to authorize us to inquire into the reasons which prompted the Convention" (Louisiana Constitutional Convention of 1921) "to limit our jurisdiction to matters involving misconduct of members of the bar. Hence, it must be resolved that **this Court, in exerting its recognized inherent power to enact rules governing the conduct of the members of the bar, is without right to pass a rule applicable to disbarment proceedings having for its purpose the creation of a separate and distinct ground for disbarment which is not founded upon acts of misconduct. . . .**"

At page 362, 201 La., and at page 588, 9 So. (2d):

> "Therefore, in conformity with the rulings in the Fourchy (106 La. 743, 31 So. 325) and Weber

(141 La. 448, 75 So. 111) cases, we hold that, while the Court has the right and authority to pass any reasonable rule respecting disbarment cases involving misconduct of attorneys, it cannot extend its jurisdiction by rules creating independent grounds for disbarment not founded upon acts of misconduct".

At page 378, 201 La., and at page 593, 9 So. (2d):

". . . our jurisdiction in disbarment cases is limited to matters involving misconduct and **we cannot create by rule grounds for disbarment which are not predicated upon wrongdoing".**

Theard's disbarment was based wholly on the Court's concept (entirely at variance with the Constitutional limitation of the Court's power in disbarment cases) that a lawyer may be disbarred for an act committed whilst insane, which certainly cannot constitute misconduct.

In 225 La. 98, 72 So. (2d) 310, the State disbarment decision, on which the present proceedings in the Federal Court wholly and completely depend, the Supreme Court, in considering the Commissioner's report and this case on its merits, despite the Constitutional limitation that disbarment cannot be granted on the ground of insanity, reiterated its views previously expressed on defendant's exception and defense of insanity, and said (at page 106, 225 La.; at page 313, 72 So. (2d)):

"Now, in opposing the Commissioner's report, respondent first assigns error to the conclusion that the **abnormal mental condition existing at the time of the commission of the wrongful acts** does

not constitute a defense to disbarment. Influencing that conclusion, as the Commissioner points out, were certain pronouncements of this court made in connection with our consideration of respondent's tendered and overruled exceptions to the petition, they having been as follows: . . . **we do not view the mental deficiency of a lawyer at the time of his misconduct to be a valid defense to his disbarment.** . . . takes it for granted that, because evidence has been produced indicating that respondent was probably suffering from amnesia and other mental deficiencies at the time of his misdeeds, his insanity **(which we will concede for purposes of this discussion) operates as a complete bar to this proceeding. We think that counsel is mistaken in his assumption . . . in our opinion it matters not whether the dishonest conduct stems from an incapacity to discern between right and wrong or was engendered by a specific criminal intent** (emphasis by the Court). . . . Petitioner (the complainant, Louisiana State Bar Association) herein . . . excepts to that part of the Commissioner's report which holds that respondent 'was suffering under an exceedingly abnormal condition, some degree of insanity'. . . . **However, in view of the conclusion reached and hereinabove declared, we need not determine the Committee's exception".**

It will be noted that the Court talks of "dishonest conduct", "commission of the wrongful acts", "misdeeds". However, **IT CONCEDES INSANITY FOR THE PURPOSE OF ITS RULING. And yet, it does not explain how the acts of a person insane, bereft of reason and irrespon-**

sible, can constitute "misconduct", the only basis of its jurisdiction to disbar, under the Constitution.

With the greatest respect, but most earnestly, we must say that we cannot bring ourselves to the belief that insanity is misconduct, and that a lawyer, who under the Constitution can be disbarred only for misconduct, can be deprived of his license to practice for the reason that years ago he suffered a mental breakdown.

The judgment of the State Court which was presented to the Federal Court as the sole cause for disbarment (Tr. p. 1), is based on insanity, a subject which the Louisiana Constitution did not bestow or vest in the Supreme Court as a ground for disbarment. The Louisiana Supreme Court, whose power of disbarment is limited to cases of misconduct, lacks jurisdiction and power to disbar an attorney for an act committed during insanity. Such a judgment is not binding and, **when presented, as in the present case, as the exclusive complaint and cause of action, cannot serve as a proper and legal basis for the disbarment of a lawyer, in the Federal Courts.**

(2)

The disbarment decision of the State Court, on which the decree of the Circuit Court of Appeals is based, is especially regrettable, since said State Court disbarment is at variance with another decision of the same Court which had given due consideration to the fact that petitioner could not be held responsible since his acts were due to conditions beyond his control.

Very shortly after he had been acquitted in the Merrill case, Theard was arraigned on March 11, 1947, on

the charge made by the Banking Department on an affidavit which had been pending against him since August, 1936. The Trial Judge in the Criminal District Court quashed this charge on the ground of prescription. The Supreme Court affirmed. State v. Theard, 212 La. 1022, 34 So. (2d) 248.

The decision in that case (212 La. 1022), is very important in the present discussion, because the Louisiana Supreme Court later disbarred Theard for an act committed during the mental illness and period of irresponsibility which he could not control and for which he was in no way responsible. **The acts charged to petitioner in the two cases were the same; in one instance, the Court held[6] that, in dealing with the matter, it should consider that these were acts which Theard, because of his mental condition, could not control; in the other,[7] the Court decided that, despite and conceding Theard's insanity, he should be disbarred on account of the said irresponsible acts.** The Supreme Court, thus officially noting and acting on Theard's mental condition, said in the earlier case, p. 1031, 225 La., p. 251, 34 So. (2d): **"If this defendant had stopped the running of prescription through some intentional and deliberate act on his part, we unhesitatingly would declare it an interruption. But since the cessation here occurred by reason of an unfortunate circumstance over which he had no control, certainly it would be most unfair to impose the penalty upon him".**

And yet, the same Court held Theard subject to the penalty of disbarment for an act committed during

[6] State v. Theard, 212 La. 1022, 34 So. (2d) 248.
[7] Louisiana State Bar Association v. Theard, 225 La. 98, 72 So. (2d) 310.

this same mental condition of illness and irresponsibility, "an unfortunate circumstance over which he had no control". State v. Theard, 212 La. 1022, 34 So. (2d) 248, 251.

Such a variance in decision and doctrine certainly shows that the disbarment decree was not well founded and was quite arbitrary. A State Court decision and the federal court decree following it, which undertake to deprive a lawyer of his right to practice on grounds that are neither stable nor sound and are at variance with another decree referring to the same facts and holding that the acts referred to were due to illness and were not deliberate or responsible—deprive the lawyer of his property right to practice his profession without due process of law—

(3)

This case is absolutely unique. No other disbarment decision has been found where the Court conceded the insanity of the defendant lawyer and disbarred him for that reason alone.

This case is unique because there is no other case in the books, where a court, in one decision, absolved the lawyer-defendant from all responsibility because of his mental infirmity releasing him from culpability as a criminal, and by another decision, more or less in the same breath, declared that, because of this insanity and excluding all charges of felonious and willful conduct, it would nevertheless disbar the lawyer solely on account of his said insanity; all this despite the complete recovery of the lawyer at the time of the decision and for some seven years previously.

The statement at page 10 of the brief of the Solicitor General herein, that, according to the accepted rule, disbarment may be based on acts committed during insanity, is not supported by the decisions which he cites. In the *Patlak* case, 368 Ill. 547 (which is also the case cited by the Louisiana Supreme Court), the Court was not satisfied with the evidence of respondent's insanity. Here are its very words:

> "The testimony is conflicting as to whether Patlak was sane or insane on the respective dates he had the transactions with the five named complainants. . . ."

Contrary to the purpose for which cited, the Pennsylvania Court declared in the *Kennedy* case, 178 Pa. 232, 35 Atl. 995, that, if it were satisfied by the evidence that the respondent was of such unsoundness of mind as to be actually insane and to render him unable to have known the difference between right and wrong, it might feel inclined to follow the argument of his counsel. But the Court found the evidence insufficient to establish respondent's insanity. In the case now before this Court, the insanity of the petitioner is established by the judgment of the same State Court which ordered his disbarment for that reason exclusively and, further, said insanity is conceded as the sole basis of the State Court's decree of disbarment!!!

> Said the Court: ". . . in our opinion it matters not whether the dishonest conduct stems from an incapacity to discern between right and wrong or was engendered by a specific criminal intent." Louisiana State Bar Association v. Theard, 225 La. 98, at page 108, 72 So. (2d) 310, at page 313.

In the *Manahan* case, 186 Minn. 98, 242 N. W. 548, respondent was afflicted with a painful dermatitis of the hand and feet brought about by a nervous condition. The referee found that respondent was fully capable of distinguishing between right and wrong and of appreciating the consequences of his acts. The Minnesota Court did not say that it would disbar an attorney for acts committed whilst insane.

In the *Fitzgibbons* case, 182 Minn. 373, 234 N. W. 637, the Minnesota Court held that respondent's mental powers had not been affected by an operation which left him subject to attacks of epileptiform and periodic nervous disturbances. Again, the Court did not say that it would disbar the attorney even if it had found (which it did not) that this mental condition had affected his capacity to distinguish right from wrong.

In re Nicolini (N. Y.), 262 Appellate Division Reports, 114, a psychiatrist, in response to a hypothetical question, "thought" that due to domestic troubles between the defendant and his wife, he was under a "tremendous emotional upheaval" during the time in question. The Court held that defense was insufficient.

In re Vincent (Ky.), 282 S. W. (2d) 335, a case of suspension. The Court considered "some physical and mental disturbance" and considered same insufficient.

In re Bivona (N. Y.), 261 Appellate Division Reports, 221, 222, the defendant suffered from epileptic amnesia, but the Court said: "There is no evidence, however, that the acts complained of resulted from such a condition."

In re Creamer, 201 Oregon 343, 270 P. (2d) 159, the Court approved a finding of professional misconduct, but stated that the record showed that, at the time defendant committed the acts, he was suffering from a mental disorder. The Court held (in a decree closely applying to the issues now before this Court) that, on a showing of patient's recovery, he might be reinstated.

(4)

A license to practice one of the learned professions constitutes property, and to deprive a lawyer of that property for an alleged reason insubstantial, arbitrary, and unknown in law, violates substantive due process.

We pleaded in the Louisiana Supreme Court that a lawyer could be deprived of his right to practice, which constitutes property, only for a sufficient and substantial reason; and specially, that he could not be removed from practice because years ago he was insane. Petitioner has presented the same defense here.

We think we have shown that the petitioner has completely recovered his health, mental and physical; that he argued thirty-seven (37) cases in the Louisiana appellate courts since his civil interdiction was lifted in May, 1948, and up to the disbarment decree in April, 1954, and that not one word of criticism has been levelled against him.

Our contention that the right to practice law is property entitled to protection under substantive due process, was mistakenly answered by the Supreme Court (225

La. 98, 72 So. (2d) 310, 315) with the quotation of a statement from Corpus Juris Secundum, Volume 7, *verbis* "Attorney and Client", Sect. 4 (b), that the right to practice law is a privilege to be earned by hard study, and that it is not property, and that the lawyer's right to due process exists only to the extent of procedural due process, *i. e.*, that he should have opportunity for defense when anyone tries to disbar or suspend him from practice. The Court added that this was its appreciation of the decisions in *Ex Parte Garland*, 4 Wall. 333, 18 L. Ed. 366, and *Ex Parte Robinson*, 19 Wall. 505, 22 L. Ed. 205.

But the Supreme Court was mistaken about what these cases hold.

Ex Parte Garland definitely holds that, when once bestowed, **the right to practice law is property and cannot be taken away without substantive due process;** and it follows, that illness twenty years ago cannot be sufficient ground for disbarment, when the lawyer has now fully and completely recovered and has demonstrated his recovery by great activity in the appellate tribunals of his State and by even greater activity at *nisi prius*,—all this for nearly ten years without a single criticism or complaint from anyone.

This Court, in *Ex Parte Garland*, 4 *Wall.* 333, at page 379; 18 L. Ed. 366, at page 370, said:

> "The attorney and counsellor being, by the solemn judicial act of the Court clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors and argue causes, is something more than

a mere indulgence revocable at the pleasure of the Court or at the command of the Legislature. **It is a right of which he can only be deprived by judgment of the Court, by moral or professional delinquency."**

Certainly, a lawyer, stricken with a mental breakdown, cannot for that reason be characterized as a person guilty of moral and professional delinquency.

And in *Ex Parte Robinson*, 19 Wall. 505, at page 512, 22 L. Ed. 205, at page 208, the Supreme Court in holding that summary disbarment was not the proper remedy for a lawyer's conduct allegedly contemptuous, held, affirming *Ex Parte Garland:*

". . . the power (to disbar) can only be exercised where there has been such conduct of the parties complained of as shows them to be unfit to be members of the profession. . .. The order of admission is the judgment of the Court that they possess the required qualification both in character and learning . . . they hold their office during good behaviour and can only be deprived of it for misconduct . . . he (the attorney) should have notice of the grounds of complaint against him and ample opportunity of explanation and defense. This . . . should be equally followed when proceedings are taken to deprive him of his right to practice his profession as when they are taken to reach his real or personal property."

The proposition that the right to practice one's profession is a property right which, like any other property right, cannot be taken away capriciously and without

proper, relevant and adequate cause, is well stated in *Frank M. Dent v. The State of West Virginia*, 129 U. S. 114, at page 121, 32 L. Ed. 623, at page 625, 9 Sup. Ct. 231, at page 233:

> "It is undoubtedly the right of every citizen of the United States, to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and conditions. . . . All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. **The interest or as it is sometimes termed the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them any more than their real or personal property can thus be taken away** . . . p. 626)."

> **"The great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizens.** As said by this Court in Yick Wo v. Hopkins, speaking through Mr. Justice Mathews: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. 118 U. S. 369, 30 L. Ed. 220, 226. See also, Pennoyer v. Neff, 95 U. S. 714, 733, 24 L. Ed. 565, 572; Davidson v. N. O., 96 U. S. 97, 104, 107, 24 L. Ed. 616, 619, 620; Hurtado v. California, 110 U. S.

516, 28 L. Ed. 232; Mo. Pac. R. v. Humes, 115 U. S. 512, 519, 29 L. Ed. 463, 465 . . . (p. 628) one who is in the enjoyment of a right to preach and teach the Christian religion as a priest of a regular church, and one who has been admitted to practice the profession of the law, cannot be deprived of the right to continue in the exercise of their respective professions, by the exaction from them of an oath as to their past conduct, respecting matters which have no connection with such professions".

(5)

Recent decisions in the Supreme Court of the United States have strongly emphasized that the individual, in respect to his estate or right of property in his employment or profession, enjoys basic rights secured by the Constitution, which must be protected.

In *Wieman v. Updegraff*, 344 U. S. 183, 97 L. Ed. 216, 73 Sup. Ct. 215, decided December 15, 1952, by the Supreme Court of the United States, certain professors in the Oklahoma Agricultural and Mechanical College were dismissed because they refused to sign a **statutory loyalty oath** under which they were called upon to swear that they had not within five preceding years been members of any organization officially determined as subversive by the United States Attorney General. The refusal of an official to sign was to be followed by his automatic removal from the public service. **This drastic rule operated without reference to any knowledge on the part of any official at the time, in the nature or objectives of the banned association.** In an action instituted to re-

strain the payment of salaries to these officials who had declined to sign the oath on the ground that it lacked due process, the Supreme Court, reversing the Oklahoma tribunals, said (344 U. S., at page 189, 97 L. Ed. 221, 73 Sup. Ct. 190):

> "Knowledge is not a factor under the Oklahoma statute. We are thus brought to the question . . . whether the due process clause permits a State in attempting to bar disloyal individuals from its employ, to exclude persons solely on the basis of organizational membership regardless of their knowledge concerning the organization to which they had belonged. For under the statute before us, the fact of membership alone disqualifies. If the rule be expressed as a presumption of disloyalty, it is a conclusive one. But membership may be innocent . . . . There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one, indeed it has become a badge of infamy. . . . **Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process.** We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that **constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary and discriminatory.**"

It is not difficult to analogize, phrase for phrase and almost word by word, the disbarment of petitioner Theard, in the light of the principles announced by the

Supreme Court of the United States in the above decision: Misconduct and culpability are not factors in the disbarment of petitioner. We are brought therefore to the question, whether the due process clause permits a Court in attempting to exclude unworthy members, to disbar lawyers solely on the ground of illness, for acts performed during a period of mental infirmity and nerve breakdown, without regard to the absence of any criminal intent. For, under the Louisiana Supreme Court decision, and therefore under the ruling of the federal courts which adopted it, **the fact of insanity alone disqualifies. Said the Court: "In our opinion it matters not whether the dishonest act stems from an incapacity to discern between right and wrong or was engendered by a specific criminal intent." If insanity be expressed as a presumption of wrongdoing on the part of a lawyer, it is a conclusive one. But the acts of a concededly insane person are innocent and connote neither criminality nor wrongdoing.** Nor can there be any dispute regarding the consequences visited upon an attorney excluded from his chosen profession by disbarment. In the view of the community, the stain is a deep one, indeed it has become a badge of infamy. Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The removal from the practice of law of a licensed person who was bereft of reason and committed no wrong, offends due process. We need not pause to consider whether *ab initio* any abstract right exists to be received in the legal profession. It is sufficient to say that constitutional protection does extend to a lawyer whose disbarment is patently arbitrary and discriminatory.

(6)

Dr. Barsky's Case.

In the matter of *Dr. Edward A. Barsky v. The Board of Regents of the University of the State of New York*, decided by the United States Supreme Court on April 26, 1954, the appellant; a physician, refused to testify and to produce before a Committee of Congress, certain records of an Association of which he was an officer. He was held guilty of contempt, tried in the District Court, and sentenced to a six months prison term, which he served. He was then suspended from practice for six months by the highest medical regulatory board of the State of New York. His appeal to the New York Courts failed, but his application for certiorari was granted by this Court. The case on its merits is reported in 347 U. S. 442, 98 L. Ed. 829, 74 Sup. Ct. 650.

This Doctor Barsky was unquestionably guilty of a wrong; he had flaunted Congress, admittedly was guilty of contempt, on account of which he had served a prison sentence.

But the constitutional difficulty in the *Barsky case*, as discerned by three of the Justices of this Court, lay in the fact that his suspension from the work of his chosen profession was hardly a matter which bore any reasonable relation to his refusal (probably mistaken) to produce certain books of some Association having not the remotest relation to the practice of medicine, and which Congress or one of its Committees considered it had the right to inspect.

On the other hand, the petitioner Theard, under his conceded insanity on which the decision of the Louisiana

Supreme Court is based, which ruling was apparently adopted by the Circuit Court of Appeals, has not been guilty of any wrongdoing. **Since the Court concedes for the purpose of its decision that he was insane, he has been disbarred despite said insanity, because the Louisiana Court held that this admitted insanity offered no defense to any act committed by him whilst he was *non compos mentis*.** It will be remembered that there can be no mistake about this, the Louisiana Court having declared unequivocally (225 La. 98, 72 So. (2d) 310, 313) in disbarring him: **"We do not view the mental deficiency of a lawyer at the time of his misconduct to be a valid defense to his disbarment. . . . In our opinion it matters not whether the dishonest act stems from an incapacity to discern between right and wrong or was engendered by a specific criminal intent".**

The suspension of Dr. Barsky was finally approved by this Court, but as stated he had been guilty of a reprehensible and illegal act, **while Theard, conceded by the decision of the Supreme Court to have been insane, could not, in logic, medicine or law, be held guilty of any actionable offense or wrongdoing.**

(7)

The dissents of Associate Justices Black, Frankfurter and Douglas, in the Barsky case.

Even under the circumstances stated and despite Barsky's admitted offense, three of the Justices of this Court had no hesitancy in condemning Barsky's suspension from his chosen field of professional work, which bore no relation to the alleged offense before the Congressional Committee on account of which he had been imprisoned.

We must conclude from what Associate Justices Black, Douglas and Frankfurter said in the *Barsky* case (347 U. S. 442, 98 L. Ed. 829, 74 S. Ct. Rep. 650) that they are unquestionably of the opinion that there must be a relevant and substantial reason for a decree of professional suspension or disbarment; and on the basis of these principles, since the petitioner was disbarred for acts committed whilst he was concededly irresponsible, and, under the decision of the State Court, without reason legal or valid, we ask this Honorable Court to refuse to recognize and follow such a doctrine so definitely criticized and condemned by three of its members and which cannot be harmonized with the holding of this Court in *Wieman v. Updegraff*, 347 U. S. 442.

Will the Honorable Justices who so strongly defended Dr. Barsky's right to practice his profession despite his wrongdoing, be less disposed to recognize the Constitutional protection due to a lawyer who has surely demonstrated his complete restoration to health and who was disbarred for acts he unwittingly committed during a period of conceded mental infirmity now nearly twenty years ago?.

In the *Barsky* case, Justice Black (with Justice Douglas concurring) said, (p. 459) 98 L. Ed. 843, 74 Sup. Ct. 659:

> ". . . the right to practice is . . . a very precious part of the liberty of an individual physician or surgeon. **It may mean more than any property.** Such a right is protected from infringement by our Constitution, which forbids any State to deprive a person of liberty or property without due process

of law . . . (p. 463). The very idea that one may be compelled to hold his life or the means of living or any material right essential to the enjoyment of life, at the mere will of another, seems intolerable in any country where freedom prevails. . . . Such arbitrary power amounts to a denial of equal protection of the law within the meaning of the Fourteenth Amendment. . . ."

Justice Frankfurter (p. 470); 98 L. Ed. 849, 74 Sup. Ct. 665:

"It is one thing to recognize the freedom which the Constitution wisely leaves to the States in regulating the professions. It is quite another thing, however, to sanction a State's deprivation or partial destruction of a man's professional life on grounds having no possible relation to fitness, intellectual or moral, to pursue his profession . . . . (p. 471). The limitation against arbitrary action restricts the power of a State 'no matter by what organ it acts'."

And Justice Douglas (with Justice Black concurring) (p. 472); 98 L. Ed. 850, 74 Sup. Ct. 666, said:

"The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. . . . The great values of freedom are the opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellowman. . . . The Bill of Rights does not say who shall be doctors or lawyers or policemen. But it does say that certain

> rights are protected, that certain things shall not be done. The Bill of Rights prevents a person from being denied employment who . . . is wholly innocent of any unlawful purposes or activity. Citing Wieman v. Updegraff, 344 U. S. 183 . . . (p. 474)."

Our thesis is that, where a man of previous irreproachable conduct and standing at the bar as an active practitioner for then nearly thirty years, becomes ill and suffers a *nervous breakdown*, and during said period of breakdown is involved in acts which are subject to criticism, but which according to a well considered opinion of the Supreme Court show that he was insane at the time and should not in reference thereto be treated as a criminal; and when that man is treated and hospitalized for this condition for nearly eleven years but regains his health completely in 1948, his civil interdiction being lifted by court decree; whereupon he resumes practice and thereafter practices for *six years* without one word of criticism of his conduct, personal or professional, and during these six years (1948 to 1954) tries 37 contested cases in the appellate courts and countless cases in the lower tribunals,— it is submitted that his disbarment, merely for the reason that he suffered from this condition of illness more than twenty years before, deprives him of his *property right* to practice his profession without adequate cause, illegally; and in violation of Due Process, contrary to the Fourteenth Amendment and the principles enunciated by this Court in *Ex Parte Garland*, 4 Wall. 333, 18 L. Ed. 366; *Wieman v. Updegraff*, 344 U. S. 187, 97 L. Ed. 216, 73 Sup. Ct. 215, and the dissenting opinions of Associate Justices Black, Douglas and Frankfurter in *Barsky v.*

Board of Regents, 347 U. S. 442, 98 L. Ed. 829, 74 Sup. Ct. 650.

(8)

It is universally conceded that disbarment is not by way of punishment but is motivated for the protection of the public and to maintain a proper level of professional standards and responsibility. The petitioner, undoubtedly subject to insanity and not responsible for his act in 1935, as found and reported by the Master appointed by the Louisiana Supreme Court to hear the testimony in the State disbarment suit,[8] had happily regained his health and was decreed to be fully cured and competent in 1948 by the judgment (after a full hearing) of the Civil District (probate) Court for the Parish of Orleans, which thereupon canceled his civil interdiction. From that time (1948) and until the decree for his disbar-

[8] The Court, in Louisiana State Bar Association v. Theard, 225 La. 98, 72 So. 2d 310, referred to the Commissioner's report, as follows:

"After termination of the hearing, the Commissioner prepared and filed a lengthy and well considered report, in which he analyzed the evidence, set forth his findings of fact . . . In summing up the evidence, he commented:

'. . . No evidence was produced by counsel for the Committee, nor even offered, to rebut the alleged mental condition of the respondent. It must then, from the record, be held that the respondent was suffering under an exceedingly abnormal mental condition, some degree of insanity.'

'. . . The Court disregarding this finding but nevertheless conceding the insanity of respondent, said: ". . . Counsel for respondent apparently takes it for granted that, because evidence has been produced, indicating that respondent was probably suffering from amnesia and other mental deficiencies . . . his insanity (which we will concede for purposes of this discussion) operates as a complete bar to this proceeding. We think that counsel is mistaken . . . **In our opinion it matters not whether the dishonest conduct stems from an incapacity to discern between right and wrong or was engendered by a specific criminal intent**"—(Emphasis by the Court).

ment in 1954, petitioner's active and irreproachable professional conduct and pursuits have conclusively demonstrated his present complete responsibility and restoration to normal health. It cannot now be claimed seriously or in good faith that, for the purpose of protecting the public, the petitioner, who is now in every way competent and responsible, should at the present time be deprived of the right to practice his profession in the Courts of the United States.

(9)

The inexcusably long delay in bringing this disbarment suit, which in Louisiana is prescribed or at least should be considered as abandoned on the ground of laches.

The U. S. Attorney, complainant herein, naturally acted only after the decision of the Louisiana Supreme Court on the merits. 225 La. 98, 72 So. (2d) 310. But the present Rule, which rests wholly on the action taken in the State Court, can hardly secure any vitality from the belated proceedings on which it depends so closely; and it is proper to say that the action in the State Court against the present petitioner should have been dismissed under the law of Louisiana as prescribed, or at least as abandoned on account of laches.

A delay of seventeen years (from 1936 to 1952) in the institution of disbarment proceedings in a State Court is hardly calculated to create confidence in the justness of the complaint.

Stale claims and causes of action in disbarment are not favored.

In this case, the inordinate delay in commencing this State disbarment suit created serious misgiving about the propriety of the prosecution itself; and, inevitably, in the present federal court proceedings, since the only cause of disbarment was the decision of the State Court based only on the irresponsible acts of an ill man during a mental breakdown many years previous, the decision of the District Court and its affirmance by the Circuit Court of Appeals come here so limited in application and effect and so shorn of sanction and authority, as to be entitled hardly to prima facie acceptance and recognition.

The Louisiana State Bar Association or its predecessor held a hearing as to the affairs of respondent in 1937. Theard was a patient in DePaul and unable to attend. So far as Theard knows, nothing ever resulted from this hearing.

The representatives of the Association and the Bar Committee say that this delay to the filing of the State disbarment action in 1952 was made necessary by Theard's illness and interdiction. It is submitted that this is not correct.

The law very clearly provides how an interdict or any person who without being interdicted is the inmate of a mental hospital shall be sued. La. Code of Practice, Articles 115 and 964 (as amended by La. Act 308 of 1910).

These rules apply to disbarment suits, which are to be tried according to the Rules and precepts prevailing in all civil actions. *In re Kenner*, 178 La. 774, 152 So. 580.

There was no reason and no excuse why, if they believed they should act, the representatives and com-

mittees of the Bar Association or Associations should wait from August 1936 until June 16, 1952 (when petitioner had fully regained his health and had already resumed active law practice for six years) to bring their suit against him.

When brought finally in 1952, the disbarment suit in respect of a cause of action which it was averred had occurred on January 2, 1935, and which certainly was widely known in the summer of 1936, was prescribed.

In Louisiana, all personal actions, not subject to any prescription specially enumerated in the Civil Code, are subject to the prescription of ten years. R. C. C., Art. 3544.

In the disbarment action, *State v. Fourchy*, 106 La. 743, 31 So. 325, 331, the defendant pleaded the prescriptions applicable in criminal law to felonies and misdemeanors. The Court made it very clear that the disbarment suit is strictly a civil action; and, said the Court: "to the method by civil proceedings thus supplied (for disbarment), the rule of prescription which relates to civil . . . actions is to be applied . . . Counsel for defendant claims that if this view be adopted, the action is nevertheless barred by the prescription of one year as declared by Civil Code, Art. 3536 against actions resulting from offenses . . . But the obligation which rests upon an attorney (is) . . . a special obligation. . . . And the action to disbar him is predicated upon the breach of that obligation . . . and the only prescription applicable to the action growing out of such violation seems to be that of ten years". (R. C. C., Art. 3544).

In the Theard disbarment case, this prescription of ten years was specially pleaded, but without mentioning it specially the Court held, apparently without giving any reason, that no definite ruling need be announced on that point despite its obvious tremendous importance. The Court said (222 La. 328, 62 So. (2d) 501, at page 504):

> "It is asserted that since the act complained of occurred more than seventeen years ago, the offense is so stale it would be inequitable to permit the prosecution of the proceeding. . . . The exception cannot be maintained. Our law of prescription is purely statutory and the fact that a long time has elapsed between the commission of the acts and the bringing of the charges does not, of itself, provide a just ground for dismissing the suit".

We do not know exactly what the Court meant by this. It certainly says little and decides nothing. The prescription of ten years had been pleaded. Under a discussion, surely not very clear, the point is not decided. No one can say that this somewhat vague disposition of defendant's plea of prescription is either a maintenance or a denial of the plea.

In that condition, the opinion presents no adjudication upon which Your Honors can rely as to what the law is. Therefore, that point of Louisiana law remained undecided, and is now open and subject to Your Honors' appreciation of the widely recognized rule that statutory prescriptions in the several statutes are generally followed in the Federal Court.

Since disbarment in Louisiana is essentially a personal action to be disposed of accordingly, it seemed rather clear that, as stated in *State v. Fourchy*, 106 La. 743, 31 So. 325 this disbarment suit, in view of the then long delay of seventeen years, should have been dismissed because of the respondent's plea of prescription. If Article 3544 applies, and we submit that in the excerpt already quoted (p. ....), the Supreme Court gives no reason why it should not apply, prescription was a very direct defense;—as stated by the Code (Art. 3459) "a peremptory and perpetual bar to every species of action, real or personal, when the creditor has been silent for a certain time without urging his claim". Further, under Art. 3530, R. C. C., nothing is required of the debtor who pleads prescription, and as declared by that Article, "the neglect of the creditor operates the prescription . . ."

(10)

Courts in numerous other jurisdictions hold with complete unanimity that stale or prescribed claims for disbarment will be dismissed.

We specially call the attention of this Honorable Court, in addition to the reference to *State v. Fourchy*, 106 La. 743, 31 So. 325, 331, to the fact that the Courts of quite a number of other jurisdictions have, over and over again, declined to subject lawyers to the trial of disbarment suits, where a period of inactivity extending beyond all reasonable delays had accrued before the action for disbarment was instituted.

In not any of these cases that we have been able to find, did the delay in instituting the proceedings for dis-

barment and which the Court disapproved of, even approximate the seventeen (now more than twenty) years which elapsed in the Theard case. And now, the present complainant is asking this Honorable Court to render a decree in respect of an act which occurred in 1935.

In *People v. Allison*, 38 Ill. 151, respondent was sued after a lapse of **SEVEN YEARS.** Said the Court:

> **". . . the law will not favor the institution of prosecutions of this character after the lapse of such a great length of time. The charge is a serious one, and if respondent should be found guilty the consequences would be most disastrous. The party whose rights are injuriously affected by conduct of the character alleged, ought to be required to exhibit his information within a reasonable time, that the attorney implicated might be afforded an opportunity to make his defense while testimony for that purpose could be had. The rule must be discharged."**

In *People v. Coleman*, 210 Ill. 79, a motion was filed to show cause why the defendant should not be disbarred for having concealed his conviction **THIRTEEN YEARS** before. The Court declined to grant the motion, saying:

> "The opportunity and the hope held out to all men to repent and correct their ways if they have ever been wrong are the only possible incentives the law can afford that can work the reformation of men who have gone wrong. . . . We cannot say that no man who has ever had a stain against his character could ever enter the legal profession. Being unable to adopt that view, the motion is denied".

In the *Matter of the Disbarment of C. E. Elliott*, 73 Kansas 151, 84 Pac. 750, fourteen separate charges were laid in the complaint for disbarment. The fourteenth charge was based on an incident which had occurred nearly **FOURTEEN YEARS** before the filing of the charges. Said the Court:

> **"Conceding there is no statute of limitation applicable to a charge of this nature, it must at least be said that it is very stale; and in this quasi-criminal proceeding, the action of the court, and the many years' acquiescence therein of the members of the bar to whom the alleged facts were made known at the time, should be regarded as an acquittal of this charge. . . .** Disposed as is this court to encourage and assist in maintaining a high standard of integrity in the profession of which we are members, and realizing as we do that no profession, except perhaps that of the clergy, demands a cleaner private life or a keener sense of professional honor than does that of the lawyer, we are unable under the evidence to impose a great forfeiture and penalty upon the accused. He is therefore acquitted."

In the case of *In re Adriaans*, 28 App. D. C. 515, the defendant appealed from an order of the Supreme Court of the District of Columbia decreeing his disbarment. The order of disbarment was founded on an offense committed **TWELVE YEARS** before. In reversing, the Court of Appeal said:

> "We appreciate the solicitude of the Court concerning the reputation of members of the bar, and

should not hinder them in purging the roll of attorneys. The disbarment of Adriaans for misconduct which happened about twelve years before is most unusual. **The majority of the justices of the Supreme Court who concurred in the order of disbarment appear to appreciate this, for they say under ordinary circumstances the lapse of time would cause the court to seriously consider the long delay in filing the charges. . . . The career of an unworthy member of the bar is apt to reveal misconduct more recent than in this case, where the proof is legally insufficient to disbar this respondent on account of an offense alleged to have been committed twelve years ago.** The order must be reversed, and it is so ordered."

People v. Tanqueray, 48 Colo. 122, 109 P. 260, shows that in Colorado the court declines to entertain stale charges against members of the bar and summarily dismisses such charges. The Court said:

"Referring to the second charge, it is proper to state that it has ever been the policy of this Court to discourage proceedings of this sort upon stale claims, and properly so as a matter of common justice to the one charged, who otherwise might manifestly be placed at great disadvantage. It is to be noted that the offenses covered in the second count are shown to have occurred about **EIGHT AND ONE-HALF YEARS** before any investigation thereof was made or prosecution thereon begun. These facts alone are, in our judgment, sufficient answer thereto."

In re Sherin, 27 S. D. 232, 130 N. W. 761:

> "While the charges made in these proceedings were, if true, sufficient to show that respondent was, at the time referred to, not only unfitted to be a member of an honorable profession, but absolutely unfitted for the society of respectable people, yet it is and should be the policy of the law to forgive one his errors long since past, and not to allow the same to be resurrected where there is nothing to show but that for several years after such wrongdoing the party may have lived an exemplary life."

In *State, ex rel. Jenett v. Clompton*, 15 Mo. App. 589, the Court dismissed disbarment proceedings brought **FIVE YEARS** after the commission of the alleged offense where the defendant has since conducted himself honorably.

In *State v. Hays*, 63 W. Va. 45, 61 S. E. 355, though holding that a disbarment action was not subject strictly to the statute of limitations, the Court said:

> "Clearly, where evidence shows a turning of one from wrong to right, a living down of gross errors after a sufficient length of time, in which there is a plain demonstration of such disposition to pursue the even tenor of his way, an attorney's name should not be stricken from the roll."

In Kansas, there is no applicable statute of limitation, but stale charges, in common justice, are not entertained. *In re Smith*, 73 Kans. 743, 85 Pac. 584.

The Courts of Illinois hold that the law will not favor disbarment proceedings brought after the lapse of a

great length of time and such proceedings for that reason alone are dismissed. *People v. Coleman*, 210 Ill. 79 **(THIRTEEN YEARS).**

(11)

The fact that an application for certiorari to the Louisiana Supreme Court in the present case was denied by this Court does not constitute a precedent on any issue raised in the present brief.

It is true that the decision of the Louisiana Supreme Court was brought up to the Supreme Court of the United States on application for certiorari and that the said application was denied without comment on October 14, 1954. See Theard v. Louisiana State Bar Association, 348 U. S. 832, 99 L. Ed., Advance, page 33, 75 Sup. Ct. 54.

But the law is well settled that orders of the United States Supreme Court denying writs of certiorari, especially when handed down without reasons or comment, have no authority or standing whatsoever as precedents.

Robertson & Kirkham, "Jurisdiction of the Supreme Court of the United States (1951), Sect. 316, page 603:

> "The fact that the Supreme Court does not sit as a court of errors and appeals in passing upon application for writ of certiorari is pointedly emphasized by its practice of giving no reasons in most cases for its refusal of the applications. See Gaines v. Washington, 277 U. S. 81, 87, 72 L. Ed. 793, 48 S. Ct. 468—. . . by its repeated warnings to

the bar that the denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times. United States v. Carver, 260 U. S. 482, 43 S. Ct. 181, 67 L. Ed. 361; Atlantic Coast Line R. Co. v. Powe, 283 U. S. 401, 403-404, 51 S. Ct. 498, 75 L. Ed. 1142; House v. Mayo, 324 U. S. 42, 48, 65 S. Ct. 517, 89 L. Ed. 739; Hamilton Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251, 258, 36 S. Ct. 269, 60 L. Ed. 629; Ohio, ex rel. Seney v. Swift & Co., 260 U. S. 146, 151, 43 S. Ct. 22, 67 L. Ed. 176."

(p. 604):

"Nevertheless, the bar, commentators and at times the lower Courts have alike persisted in drawing inferences as to the merits of controversies or as to jurisdiction of Courts from the fact that the Supreme Court has refused certiorari."

(p. 605):

"The danger with which such indulgence in inference is attended would appear to be sufficiently demonstrated by the not inconsiderable number of cases in which the petition for certiorari has been denied on first application, but has been subsequently granted either on petition for rehearing or sua sponte. . . . Indeed, where counsel has relied on denials of certiorari in similar cases as a reason for failing to appeal in a subsequent case, the Court has held that such failure was not justified."

(p. 610):

> "Denial without expression of reason remains the general practice, and, in view of the volume of applications for certiorari and the complexity of the issues they present, this practice must be adhered to, if the certiorari jurisdiction is to fulfill the function for which it was created."

CONCLUSION.

For the reasons set forth in the present brief, the petitioner Delvaille H. Theard prays that the judgment of the District Judge herein, affirmed by the decree of the United States Court of Appeals, Fifth Circuit, be reversed; and that the motion of the United States Attorney herein (Tr. p. 1), for petitioner's disbarment, be discharged and denied.

Respectfully submitted,

DELVAILLE H. THEARD,
Pro Se.

CERTIFICATE.

Copies of the foregoing brief have been served on J. Lee Rankin, Solicitor General of the United States, and on M. Hepburn Many, United States Attorney for the Eastern District of Louisiana, by depositing said copies in the mail, postage prepaid, at New Orleans, on September 10, 1956.

New Orleans, September ....., 1956.

APPENDIX.

Fourteenth Amendment to the Constitution of the United States, Section 1:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Judicial Code of the United States, Title 28, Section 1254 (1):

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree." . . .

———o———

Constitution of the State of Louisiana (1921), Article VII, Section 10:

> "The Supreme Court shall have control of, and general supervision over all inferior courts and shall have further jurisdiction as follows:

"It shall have exclusive original jurisdiction in all disbarment cases **involving misconduct of members** of the bar, with the power to suspend or disbar under such rules as may be adopted by the court. . . ."

Excerpt of Order of Louisiana Supreme Court, of date March 12, 1941:

"The Louisiana State Bar Association is hereby organized under the rule-making power of the Court. The rules and regulations which shall govern it as an agency of the Court are the articles set forth in Exhibit A, which is the proposed form of articles of incorporation, and a copy of which is annexed to this order and made a part hereof, as fully as though copied in extenso herein. The Court hereby adopts and promulgates the articles of said proposed form as rules of this Court".

Charter of Louisiana State Bar Association, Article 13, "Discipline and Disbarment of Members":

Section 1. "The Committee on Professional Ethics and Grievances shall consist of five active members of this Association, appointed by the Supreme Court on the recommendation of the Board of Governors. The term of office of the first committee to be appointed pursuant hereto shall begin. . . ." (Page 377, L. S. A.-Revised Statutes, Volume 21).

Section 4. "If, after investigation, a majority of the Committee shall be of the opinion that the member against whom the complaint has

been made has probably been guilty of a violation of the laws of the State of Louisiana relating to the professional conduct of lawyers and to the practice of law, **or of a willful violation of any rule of professional ethics of sufficient gravity as to evidence a lack of moral fitness for the practice of law,** it shall be the duty of the Committee to institute in the Supreme Court a suit for the disbarment or suspension of the accused member of the bar, and to designate one or more of their number to prosecute the same". (Page 380, L. S. A.-Revised Statutes, Vol. 21).

This Order of Court and said Charter of Louisiana State Bar Association reproduced at pages 353 and following of West's Louisiana Statutes Annotated, Revised Statutes, Volume 21 (1951).

Revised Civil Code of Louisiana:

Article 3544: "In general, all personal actions, except those before enumerated, are prescribed by ten years".

Article 3459: "The prescription by which debts are released, is a peremptory and perpetual bar to every species of action, real or personal, when the creditor has been silent for a certain time without urging his claim".

Article 3528: "The prescription which operates a release from debts, discharges the debtor by the mere silence of the creditor during the time fixed by law, from all actions, real or personal, which might be brought against him".

Article 3530: "To enable the debtor to claim the benefit of this prescription, it is not necessary that he should produce any title, or hold in good faith; the neglect of the creditor operates the prescription in this case".

Louisiana Code of Practice:

Article 115: "Actions against interdicted persons . . . must be brought directly against . . . the curator of the interdicted person".

Article 964: "The above provisions shall not be so construed as to prevent persons having claims against a minor, insane person not interdicted but committed to an insane asylum or a person absent, pursuging the same previous to the interdiction of such insane person or to a tutor or curator having been appointed as above prescribed; but in such cases, the person claiming must in his petition pray the court to which it is addressed to appoint a tutor or curator 'ad hoc' to defend the minor, insane or absent person in the action" (As amended by Act 308 of 1910).